

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

REBA SWINNEY)	
Claimant)	
VS.)	
)	
FIRST GROUP AMERICA, INC.)	Docket No. 1,056,939
Respondent)	
AND)	
)	
NEW HAMPSHIRE INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of Administrative Law Judge John D. Clark's January 3, 2013 preliminary hearing Order. Phillip B. Slape of Wichita, Kansas, appeared for claimant. John David Jurcyk of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by Judge Clark and consists of the January 3, 2013 preliminary hearing transcript, with exhibits, and all pleadings contained in the administrative file.

ISSUES

Claimant injured her right knee in a work-related accident on February 22, 2011, when she fell after missing the bottom step on a bus. Respondent provided medical treatment, including a total right knee replacement. Claimant contends she developed left knee pain as the direct and natural result of her right knee injury. Judge Clark concluded claimant failed to prove her left knee injury was work related and denied her request for medical treatment. Claimant asserts Judge Clark erred.

Respondent requests that the Appeals Board dismiss claimant's appeal for lack of jurisdiction, or, if the Board has jurisdiction, affirm Judge Clark's Order.

The issues before the Board are:

- (1) Does the Board have jurisdiction to review Judge Clark's Order?
- (2) Did claimant prove her left knee injury was the direct and natural result of her right knee injury?

FINDINGS OF FACT

Claimant worked as a school bus driver. On February 22, 2011, claimant fell when exiting the bus, landed on her right knee, followed by her left knee and both hands.

Claimant was initially provided conservative treatment. On April 18, 2011, claimant was seen by Brennen L. Lucas, M.D., an orthopedic physician. Bilateral knee x-rays showed nearly complete loss of joint space in claimant's medial compartments bilaterally. Dr. Lucas' examination of claimant's right knee revealed tenderness and effusion, but claimant did not have such findings with the left knee. Claimant's right knee range of motion was decreased. Dr. Lucas diagnosed claimant with extensive degenerative joint disease and a right knee medial meniscus tear.

Claimant told Dr. Lucas that she wanted a total knee replacement. On May 16, 2011, Dr. Lucas referred claimant to Paul C. Pappademos, M.D., for consideration of such surgery.

Robert L. Eyster, M.D., evaluated claimant at respondent's request on July 13, 2011. Dr. Eyster noted near bone on bone appearance of both knees, worse on the right. Claimant told Dr. Eyster her left knee was asymptomatic. Apart from commenting on the results of bilateral knee imaging studies, it does not appear that Dr. Eyster evaluated claimant's left knee. Dr. Eyster agreed claimant needed a total right knee replacement.

John R. Babb, M.D., examined claimant at her attorney's request on September 12, 2011. Dr. Babb noted claimant had normal gait. Dr. Babb did not record ongoing left knee complaints. Dr. Babb diagnosed claimant with right knee pain, degenerative joint disease, chondromalacia and arthritis. Dr. Babb's report specifically noted that he evaluated claimant's right knee; it does not appear that Dr. Babb evaluated claimant's left knee.

Claimant was evaluated by Dr. Pappademos on December 14, 2011. Dr. Pappademos observed that claimant had antalgic gait due to right knee pain. Dr. Pappademos' physical examination appeared to focus on claimant's right knee. Dr. Pappademos diagnosed claimant with bilateral knee osteoarthritis, with the right knee being symptomatic. He suggested claimant have a total right knee replacement.

Claimant underwent a total right knee arthroplasty on February 21, 2012.

Claimant testified that between the time of her accident and her right knee surgery, she had “very little” problems with her left knee that would subside if she took Ibuprofen.¹ She testified that after her right knee surgery, her walking was “unbalanced and uneven”² and her left leg became stiff and sore. She testified that her left knee pain became bothersome by late-May 2012.

An August 9, 2012 “Outpatient Rehabilitation Scheduling” sheet, signed by Dr. Pappademos or his staff, noted claimant had “no confidence in [her right] knee”³ and needed work hardening.

George G. Fluter, M.D., evaluated claimant at her attorney’s request on October 23, 2012. Claimant complained of pain affecting both knees and hips. Dr. Fluter indicated claimant’s “altered gait mechanics . . . led to aggravation of the condition affecting the left knee resulting in painful symptoms.”⁴

Claimant participated in work hardening at Via Christi in October and November 2012. A November 7, 2012 Functional Capacity Evaluation (FCE) report noted claimant had been attending work therapy for several weeks and initially had a “pronounced limp, favoring her right lower extremity.”⁵ The report did not indicate whether claimant still limped at the time of the FCE.

Dr. Pappademos released claimant at maximum medical improvement on November 8, 2012. Dr. Pappademos rated claimant’s permanent partial impairment at 37% of the right knee in his December 19, 2012 letter. None of Dr. Pappademos’ post-surgical records mention claimant having left knee symptoms, including a November 8, 2012 restriction sheet and his December 19, 2012 impairment rating report. Claimant testified that she had mentioned left knee problems to Dr. Pappademos and his associate, but they wanted to focus on her right knee.

At the preliminary hearing, claimant complained of aching, burning, pain and swelling in the left knee and indicated her symptoms had gotten progressively worse. She testified her right leg was “doing just fine.”⁶

¹ P.H. Trans. at 9-10.

² *Id.* at 11.

³ P.H. Trans., Resp. Ex. 1 at 24.

⁴ *Id.* at 18.

⁵ P.H. Trans., Resp. Ex. 1 at 5.

⁶ P.H. Trans. at 11.

PRINCIPLES OF LAW

It is claimant's burden of proof "to persuade the trier of facts by a preponderance of the credible evidence that [her] position on an issue is more probably true than not true on the basis of the whole record."⁷

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁸ K.S.A. 2010 Supp. 44-501(c) states in part that an employee "shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability." The test is not whether the injury causes the condition, but whether an injury aggravates, accelerates or intensifies the condition.⁹

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is compensable.¹⁰ "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."¹¹

ANALYSIS

Jurisdiction

Respondent argues that whether claimant's left knee was injured as a result of claimant's right knee injury addresses the nature and extent of her injury, which would not be an appealable issue from a preliminary hearing order. Respondent is correct that the Board had previously declined jurisdiction from preliminary hearing order appeals where the issue appealed was viewed as concerning the nature and extent of a claimant's injury. For instance, whether a psychological injury was the result of an injury had been viewed in the past as being a nature and extent issue, which would not be appealable from a preliminary hearing order.¹²

⁷ K.S.A. 2010 Supp. 44-501(a) and 44-508(g).

⁸ K.S.A. 2010 Supp. 44-501(a).

⁹ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 590, 257 P.3d 255, 259 (2011).

¹⁰ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

¹¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh'g den.* (2007).

¹² See *Ayers v. Brackett*, No. 1,000,987, 2003 WL 23172903 (Kan. WCAB Dec. 30, 2003).

However, the Board considers the question of whether an injury is the direct and natural result of an original or primary injury as being under the umbrella of the “arising out of and in the course of employment” issue, which the Board has jurisdiction to hear on an appeal from a preliminary hearing order.¹³

Causation

The lack of antalgic gait at the time claimant was evaluated by Dr. Babb in September 2011 would not preclude antalgic gait thereafter, as confirmed by Dr. Pappademos in December 2011, Dr. Fluter in October 2012 and the November 2012 FCE, which indicated claimant was limping when work therapy started several weeks earlier.

Claimant testified her left knee symptoms were more pronounced after her right knee surgery. While she testified her right leg was doing just fine, the medical records indicate differently. The August 9, 2012 referral to work hardening indicated claimant had no confidence in her right knee. The November 7, 2012 FCE report indicated claimant had a pronounced limp from favoring her right knee, at least when work hardening began, but did not show claimant's limp went away. Dr. Pappademos' rating report, based on his November 8, 2012 evaluation, noted claimant's right knee was sore. If claimant's right knee was symptomatic and she was limping, it would make sense for her to continue to put more weight on her left knee, both before and after her right total knee replacement.

There is the only one expert medical report in evidence addressing whether claimant's right knee injury resulted in her left knee symptoms. Dr. Fluter opined claimant's left knee problems were due to altered gait. No contrary expert medical opinion directly addressing causation is in evidence. There is no evidence that any doctor, apart from Dr. Fluter, even evaluated claimant's left knee after Dr. Lucas did so on April 18, 2011.

As the record currently stands, this Board member finds it is more probable than not that claimant's left knee condition was aggravated because she favored her injured right knee, as noted by both Dr. Fluter and claimant's testimony. The absence of left knee complaints in earlier medical records does not convince this Board Member otherwise. Claimant met her burden of proof that her left knee condition was worsened as the direct and natural result of her right knee injury.

¹³ See *Baty v. Woodhaven Care Center*, No. 1,047,549, 2010 WL 1445627 (Kan. WCAB Mar. 31, 2010); *Awad v. U.S.D.* No. 512, No. 1,037,459, 2008 WL 4149969 (Kan. WCAB Aug. 18, 2008); *Coggs v. Swift Eckrich, Inc.*, No. 1,019,223, 2005 WL 1983412 (Kan. WCAB July 1, 2005) (“Since only jurisdictional issues are subject to review in an appeal from a preliminary hearing, the Board has, in previous cases, held that the ability to directly trace psychological or psychiatric injury to a physical injury concerns only the nature and extent of the disability. As the existence of such causal relationships appeared to be a step removed from the jurisdictional milieu and have no bearing upon the compensability of the claimant's accident and injury, the Board at one time declined to review the question at this stage of the proceedings. However, the Board now considers this issue to be jurisdictional.”).

CONCLUSIONS

(1) The Board has jurisdiction to hear this appeal.

(2) This Board Member reverses Judge Clark's finding that claimant did not meet her burden of proof that her left knee symptoms are a direct and natural result of her February 22, 2011 accidental injury. The Board remands this matter to Judge Clark to address claimant's request for medical treatment for her left knee.

(3) Preliminary hearing findings and conclusions are neither final nor binding as may be modified upon a full hearing.¹⁴

DECISION

WHEREFORE, the undersigned Board Member reverses Judge Clark's January 3, 2013 preliminary hearing Order and remands the matter to him to address claimant's request for medical treatment for her left knee.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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John David Jurcyk
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Honorable John D. Clark

¹⁴ K.S.A. 44-534a.